The Toledo Hospital *and* Teamsters, Chauffeurs, Warehousemen and Helper's Union, Local No. 20, International Brotherhood of Teamsters, AFL–CIO, Petitioner. Case 8–RC–14711

November 15, 1994

ORDER DENYING REVIEW

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

The Board has delegated authority in this proceeding to a three-member panel, which has considered the Petitioner's request for review of the Regional Director's Supplemental Decision and Certification of Results (pertinent parts of which are attached). The request for review is denied as it raises no substantial issues warranting review. In denying review with respect to Objection 1, which alleged that the postelection unit modification prevented eligible voters from making an informed decision, we find *Hamilton Test Systems v. NLRB*, 742 F.2d 136 (2d Cir. 1984), and similar cases factually distinguishable and, therefore, we find it unnecessary to pass on them. In *Hamilton Test* and *NLRB v. Lorimar Productions*, 777 F.2d 1294 (9th Cir. 1985), a change of one vote would have altered the outcome of the election. In *NLRB v. Parsons School of Design*, 793 F.2d 503 (2d Cir. 1986), a change of four votes would have affected the election results. Here, the Petitioner lost by 14 votes out of 82 ballots cast, with 4 nondeterminative challenged ballots. In *Hamilton Test*, the unit was reduced by half and the number of classifications decreased from 5 to 3. In *Lorimar*, the unit was reduced by almost 40 percent, from 17 employees in 2 classifications to 11 employees in 1 classification. In *Parsons*, although the postelection modification was not as numerically significant (about 10 percent), the particular change, eliminating full-time faculty from the unit of part-time faculty, was deemed of special significance. We do not view the change in the size of the unit here (19.5 percent, according to the Petitioner) as signifying a sufficiently significant change in character and scope to warrant setting aside the election, since the Petitioner sought a skilled maintenance unit and the Board found the added classifications to be skilled maintenance employees. Accordingly, we agree with the Regional Director that Objection 1 is properly overruled.

MEMBER COHEN, dissenting.

I would grant the Petitioner's request for review.

APPENDIX

Regional Director's Supplemental Decision and Certification of Results

Pursuant to a Decision and Direction of Election issued by me on November 24, 1992, an election was conducted on December 22, 1992, among the employees in the following unit:

> All skilled maintenance employees employed by the Employer at its 2142 North Cove Boulevard, Toledo, Ohio facility including all plumber/journeymen, carpenter/journeymen, plasterer/painter journeymen, locksmiths, electrician/journeymen, stationary engineers, HVAC journeymen, refrigeration mechanic journeymen, maintenance mechanic journeymen, maintenance mechanics, maintenance mechanic helpers, incinerator operators, groundskeepers, maintenance planners, and energy management engineers, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

On December 8, 1992, the Employer filed a Request for Review of my decision seeking the inclusion of 17 other job classifications in the unit.

Shortly before the election was conducted, the Board granted the Employer Request for Review, ordering that the election be held as scheduled and the ballots impounded pending the Board's Decision on Review.

On September 30, 1993, the Board issued its Decision on Review, 312 NLRB No. 113 (1993), modifying the unit by including the additional classifications of Certified Biomedical Engineering Technologists, Biomedical Engineering Technologist, Junior Biomedical Technologists, Lead Telecommunications Technician, Telecommunications Technician. In addition, the Board ruled that employees in the positions of Technical Analyst, Network Analyst, and Radiology Service Specialist should be allowed to vote under challenge.

On October 6, 1993, the Union filed a motion for reconsideration with the Board requesting a second election in the expanded unit because of the ''substantial change in the scope of the unit.'' That motion was denied by the Board on November 17, 1993, ''without prejudice to Petitioner's filing of objections once the ballots are counted.''

On November 22, 1993, the votes cast by the eligible voters in the December 2, 1992 election were counted. The tally of ballots reflects that of approximately 118 eligible voters, 82 cast ballots, with 32 being cast for the Petitioner and 46 votes against. There were four challenged ballots, a number insufficient to affect the results of the election.

On November 24, 1993, the Petitioner filed timely objections to the election, a copy of which was duly served on the Employer. A copy of those objections is attached hereto and incorporated here.

Pursuant to Section 102.69 of the Board's Rules and Regulations, an investigation of the objections has been made. Based on that investigation, I make the following findings, conclusions, and recommendations:

OBJECTION 1

In this objection, the Petitioner asserts that the addition of five job classifications to the unit by the Board in its Decision on Review resulted in a substantial change in the scope and content of the unit, thus failing to ensure that the rights of the eligible voters to make a free and informed choice in the election were upheld.

In support of this objection, the Petitioner alleges that the employees voting in the December 22, 1992 election were misled as to the scope of the bargaining unit at the time of the balloting and thus were not in a position to intelligently cast their ballot. Furthermore, according to the Petitioner, the employees might have voted differently had they known the scope of the unit at the time of the balloting. Thus, the Petitioner maintains that, had the employees known that the bargaining unit ultimately ordered by Board was larger, they might have believed that it would have sufficient strength to justify union representation. Finally, the Petitioner points out that the Board Decision added at least 17 employees to the unit, increasing the size of the unit by 19.5 percent.

The Petitioner cites *Hamilton Test Systems v. NLRB*, 742 F.2d 136 (2d Cir. 1984); *NLRB v. Lorimar Productions*, 777 F.2d 1294 (9th Cir. 1985); and *NLRB v. Parsons School of Design*, 793 F.2d 503 (2d Cir. 1986), as authorities for the proposition that the election must be overturned. In each of these cases, according to Petitioner, a Regional Director issued a decision regarding the scope of the unit and one of the parties filed a request for review with the Board. While that request was pending, ballots were cast and impounded pursuant to instructions from the Board. After a substantial period of time, the Board issued a decision which modified the scope of the unit previously found appropriate by the Regional Director.

When these cases were considered by the Court of Appeals for the Second and Ninth Circuits during proceedings which challenged certifications by the Board, they were each remanded to the Board for the conduct of new elections in the unit ultimately found appropriate by the Board. In each of the above-noted decisions the court accepted the employer's arguments claiming that the change in the scope of the unit could have affected the result of the election, based on factors such as insufficient notice regarding the unit's status, decreased unit size which may be used by employees to determine the strength of the resulting unit, and additional personality conflicts within the smaller unit. Therefore, reasoned the courts, in order to ensure a fair election, it must be conducted in the unit ultimately found to be appropriate by the Board.

The Petitioner distinguishes cases wherein the courts have granted enforcement of a Board bargaining order [for example *Nightingale Oil Co. v. NLRB*, 905 F.2d 528 (1st Cir. 1990), and *Sears, Roebuck & Co. v. NLRB*, 957 F.2d 52 (2nd Cir. 1992)] in similar factual situations by pointing out that the unit found appropriate by the Regional Director and the unit ultimately found appropriate by the Board in these cases were the same, in spite of an intervening request for review granted by the Board and the subsequent impound of the ballots. The Petitioner reasons that the election notices provided by the Regional Director in each of these cases gave the employees accurate notice regarding the scope of the voting unit, therefore, according to the court, the unit considered by those voting was the same as that ultimately found appropriate by the Board and no confusion or uncertainty among the voters resulted.

Finally, the Petitioner points out that the remedy available to an Employer in this situation—that is, to gain review of this matter in the courts by testing the certification—is unavailable to it because it can only appeal to the Board regarding an election matter.

The Employer, in an extensive presentation, asserts that the Petitioner, in its view, has not established the facts relied on by the court in *Hamilton* and *Sears* which were significant in deciding this issue. Thus, the Employer asserts, the court first determined whether the employees were informed concerning the voting procedure and the status of the unit prior to the balloting. If they were not, then the court considered additional factors which may or may not establish whether the failure to inform the voters could have influenced them to change their vote. The analysis of this second part of the test considers such issues as the difference in size of the two units, the character and scope of the pre- and post election unit, and the closeness of the election results.

Application of this analysis to this election establishes, according to the Employer, that the Petitioner has failed to sustain its burden of proof, neither establishing that the employees were inadequately informed concerning the voting procedure and the unit status, nor presenting evidence that any failure to inform was sufficient, based on the established criteria, to convince a significant number of employees to change their vote. Therefore, reasons the Employer, the Petitioner has presented insufficient evidence to establish that the increase in the size of the unit affected the election.

While I recognize that the arguments presented by the Petitioner in this matter are worthy of consideration, I cannot dictate a change in Board precedent. Thus, even though the courts have overturned elections where the Board has significantly *reduced* the size of the unit based on an employer argument that the smaller unit could have influenced employees to vote against representation because of the reduced unit size, the Board never accepted that argument as anything more than the law of the case. See *Parsons School of Design*, 275 NLRB 173 fn. 2 (1985). Acknowledging that the Union is making a similar argument here—that is, that employees may have been influenced to vote *in favor* of representation had they known that the unit would be significantly larger and thus stronger, I am nevertheless bound to apply Board precedent in this matter, even where, as here, the Petitioner does not have recourse to the courts. See *Iowa Beef Packers*, 144 NLRB 615, 615 (1963).

Therefore, I find and conclude that Petitioner's Objection 1 is without merit and I shall overrule it.